RE: FOO HOCK LENG @ FOO LEW; *EX PARTE:* SOUTHERN FINANCE COMPANY BERHAD

HIGH COURT, KUALA LUMPUR
DATO' SITI NORMA YAAKOB J.
[IN BANKRUPTCY NO. D2-29-5267-92]
29 MAY 1993

BANKRUPTCY: Application to set aside bankruptcy notice - Debtor not served with sealed copy of bankruptcy notice contrary to r. 97, Bankruptcy Rules 1969 - Whether proceedings nullified - Whether substantial injustice caused to debtor.

BANKRUPTCY: Loan agreement - Loan to debtor secured by assignment of property - Creditor issued bankruptcy notice while assigned property remained unsold - Whether issue of notice thereof premature - Whether creditor dutybound to dispose off property before instituting bankruptcy proceedings.

By a loan agreement cum assignment dated 11 February 1985 the creditor granted a loan of RM130,000 to the debtor to finance the purchase of a piece of property which, in turn, was assigned to the creditor as security for the said loan. The debtor defaulted in repayment and pursuant to a judgement obtained *vide* Malacca Civil Suit No. 23-94-87 the creditor initiated bankruptcy proceedings against the debtor and served on him a certified true copy of the bankruptcy notice. The facts however showed that apart from the said suit and the bankruptcy proceedings that followed, the creditor had also filed a seperate foreclosure proceedings to sell off the property but this was later discontinued by notice signed by both parties.

The debtor applied to set aside the bankruptcy notice on the grounds that its issue was premature as the creditor ought first to sell off the assigned property and try to recover the debt therefrom before embarking on the bankruptcy proceedings, that there was non-compliance with r. 97 of the Bankruptcy Rules 1969 as the the debtor was not served with the required sealed copy of the bankruptcy notice and lastly, that he had a valid cross claim against the creditor.

Held:

[1] A formal defect will not invalidate a bankruptcy proceedings unless such defect had caused substantial injustice to the debtor. In this case apart from their form, the substance of the certified copy of the bankruptcy notice is the same as that of the sealed copy. Under these circumstances the debtor cannot be said to be prejudiced by being served with the certified copy.

[2] Clause 31 of the loan agreement provides that the assignmemnt shall not prejudice or affect the right to any other remedy which the creditor has against the debtor. Besides, it is settled law that a debtor cannot dictate which of two remedies the creditor should first enforce. There is thus no duty by the creditor to dispose off the property before proceeding against the debtor personally on his covenant to pay.

[3] The judgement obtained in Malacca Civil Suit No. 23-94-87 was a judgement in default which went to show that the debtor had chosen not to defend the action. That being the case it is too late to raise the cross claim now when it could have been raised in the civil suit itself.

[Application dismissed].

Cases referred to:

Re v. David, ex p United Asian Bank Bhd. [1991] 2 MLJ 127 ***(dist)***

Re Peh Kong Wan ex p United Malayan Banking Corp. Bhd. [1992] 2 MLJ 292 ***(dist)***

Legislation referred to:

Bankruptcy Act 1967, s. 131
Bankruptcy Rules 1969, rr. 97, 99(1), 109

For the applicant - Haji Abdul Kariem Bashir; M/s. Bashir & Co.
For the respondent - Elsie Tan; M/s. K.C. Yap Kamaludin & Partners

JUDGMENT

Siti Norma Yaakob J:

In applying to set aside the Bankruptcy Notice issued against him, the debtor raised the following objections:

(1) That r. 97 of the Bankruptcy Rules 1969, has not been complied with.
(2) The Bankruptcy Notice had been prematurely issued.
(3) That he has a cross claim or set-off against the creditor's claim.

It is not disputed that the debtor was not served with a sealed copy of the Bankruptcy Notice but only with a certified true copy, contrary to r. 97, and the issue is whether such defective notice nullifies the bankruptcy proceedings.

Under s. 131 of the Bankruptcy Act 1967, a formal defect shall not invalidate proceedings in bankruptcy unless a Court is of the opinion that substantial injustice to the debtor had been caused by the defect which cannot be remedied. What is substantial injustice must depend on the facts of each case.

In this case, the substance of the certified copy of the Bankruptcy Notice is the same as that of the sealed copy, the only difference being the forms the 2 documents take. Whilst one has the seal of the Court, the other has a certification that it is a true copy of the original. Under these circumstances, I consider that the debtor had not been prejudiced by being served with the certified copy of the Bankruptcy Notice and that no substantial injustice had been caused to him.

The debtor cited 2 authorities which are distinguishable. In *Re v. David, ex p United Asian Bank Bhd.* [1991] 2 MLJ 127, Zakaria J. found 3 defects in the Creditor's Petition. Firstly, the petition on the face of it was not signed by the creditor in the presence of a witness as required by r. 99(1), as the words "signed by the petitioner in my presence" are absent from the petition.

Secondly, the petition was signed by the Attorney of the petitioner but there was no evidence to show that the Attorney was acting under a valid Power of Attorney.

Thirdly, on facts similar to the case before me, only the copy of the petition and not the sealed copy, as required by r. 109, was served on the debtor.

Zakaria J. found that collectively all 3 defects were serious defects as to cause substantial injustice to the debtor.

In *Re Peh Kong Wan ex p United Malayan Banking Corp. Bhd.* [1992] 2 MLJ 292, there was a finding that when substituted service of the petition was made and effected, the debtor was no longer within the jurisdiction of the Court and under those circumstances the Court held that the debtor ought not to have been adjudged a bankrupt. The facts of this case and the issue raised are totally different from that before me.

The Bankruptcy Notice issued against the debtor is founded on a judgment debt obtained by the creditor in Malacca Civil Suit No. 23-94-87. The cause of action in that suit is on a loan agreement cum assignment dated 11 February 1985, wherein the creditor granted the debtor a loan of RM130,000 to finance the purchase of a piece of property which, in turn, was assigned by the debtor to the creditor as security for the loan.

Besides the civil suit, the creditor had also filed foreclosure proceedings, Originating Summons No. 31-71-87, at the Malacca High Court to sell the property by public auction or private treaty to satisfy the outstanding loan due to the creditor. The originating summons is dated 25 February 1987, but it was discontinued by a notice signed by both parties dated 22 July 1987.

It is the debtor's contention that under clauses 24 and 25 of the loan agreement cum assignment, the creditor must sell the property first and with the proceeds of sale, settle the outstanding loan and if there is a shortfall, proceedings can then be instituted against the debtor on his personal covenant to pay. As the property remains unsold, the debtor submits that the Bankruptcy Notice had been prematurely issued and these bankruptcy proceedings should therefore be struck out.

Objection was taken by the debtor on the notice of discontinuance that was filed in the foreclosure proceedings in that it is defective as having been filed without leave. It is clear from the notice itself that it was filed with the consent of both the creditor and the debtor. Under those circumstances, leave is no longer necessary to discontinue the originating summons.

Quite apart from the provisions of clauses 24 and 25 of the loan agreement cum assignment, the parties had also agreed to the inclusion of clause 31 which provides that the assignment shall not prejudice or affect the right of any other remedy which the creditor has against the debtor. Quite apart from this contractual obligation, it is settled law that a debtor cannot dictate which of 2 remedies the creditor should enforce first and based on this and clause 31, there is no duty imposed on the creditor to dispose off the property before proceeding against the debtor personally on his covenant to pay.

As an extension of his argument that the property must first be sold before these bankruptcy proceedings can be commenced against him, the debtor also contends that he has a cross claim which far exceeds the judgment sum due to the creditor. He argues that since the value of the property is about RM250,000 and exceeds the judgment sum, he has a valid cross claim against the creditor's claim.

If we look at the last sentence of the Bankruptcy Notice, such cross claim can only be considered where it was not possible to raise it in the original action where the judgment on which the Bankruptcy Notice is founded, was obtained.

The judgment was obtained in Malacca Civil Suit No. 23-94-87. It was a judgment in default and from the very nature of the judgment itself, the debtor had chosen not to defend the action at all. That being the case, it is too late to raise the cross-claim now when it could easily have been raised in the civil suit itself.

There is also no evidence how the debtor had arrived at the market value of RM250,000 for the property. In his affidavit, he merely asserts that fact from information received from his solicitors and from his own belief and nothing more. Under such circumstances, I cannot consider the market value of the property placed by the debtor to be the true market value.

For the reasons that I have given, I find no merits on the debtor's application to set aside the Bankruptcy Notice and on that finding I had dismissed his application with costs.

TAN SIEW CHONG

v.

LIM HOCK THEAM & ORS.

HIGH COURT, PENANG
TUAN T. SELVENTHIRANATHAN JC
[ORIGINATING SUMMONS NO. 24-517-90]
30 NOVEMBER 1993

LAND LAW: Application for recovery of possession of land - O. 89 Rules of the High Court 1980 - Whether plaintiff was entitled to possession of the land - Whether defendants were occupying the land with the licence and consent of the plaintiff.

The plaintiff filed an application under O. 89 of the Rules of the High Court 1980 (RHC 1980) for the recovery of possession of a piece of land (Lot 185). The plaintiff claimed that the first defendant had surreptitiously entered upon Lot 185 and erected new premises thereon without the consent or the licence of the plaintiff.

Held:

[1] The Court was unable to accept the contention of Counsel for the first defendant, which was unsupported by any affidavit evidence, that there was a truncated demolition of premises 3993 in that the half on Lot 186 was demolished while the other half on Lot 185 was left standing. There was evidence, which was not refuted by the first defendant, that compensation was paid in respect of premises 3993 by the owner of Lot 186 in 1971. Therefore premises 3993 now standing on Lot 185 must have been erected surreptitiously as claimed by the plaintiff.

[2] There is no doubt that there were some other premises on Lot 185 which had been erected with the consent of the plaintiff and the dispute in respect of which had been amicably settled as conceded by the first defendant. However, in relation to the existing premises 3993, the plaintiff has shown that he is entitled to possession thereof together with the land on which it stands considering the fact that ground rent was never paid by the defendants.

Obiter:

Where the initial occupation of the land is without consent or licence, the continued occupation thereof without some positive evidence of acquiescence, consent or licence by the plaintiff cannot confer upon the occupiers the status of